

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 10, 2009

JOSEPH DARRYL GAINES v STATE OF TENNESSEE

Appeal from the Circuit Court for Wayne County
No. 14167 Jim T. Hamilton, Judge

No. M2009-00735-CCA-R3-HC - Filed December 15, 2009

Petitioner, Joseph Darryl Gaines, pled guilty to two counts of rape of a child in 2001. As a result, he received concurrent eighteen-year sentences. Previously, Petitioner filed two unsuccessful petitions for writ of habeas corpus. *See Joseph D. Gaines v. Kevin Myers, Warden*, No. M2005-01889-CCA-R3-HC, 2006 WL 287432 (Tenn. Crim. App., at Nashville, Feb. 7, 2006), *perm. app. denied*, (Tenn. Sept. 5, 2006); *Joseph D. Gaines v. Kevin Myers, Warden*, No. M2004-00725-CCA-R3-HC, 2004 WL 2479918 (Tenn. Crim. App., at Nashville, Nov. 4, 2004), *perm. app. denied*, (Tenn. Feb. 28, 2005). Petitioner filed the petition for writ of habeas corpus herein on October 23, 2008, alleging that his indictment failed to allege offenses. The trial court dismissed the petition. Petitioner appeals this decision. However, we determine that the untimely notice of appeal should be waived in the interest of justice. After reviewing Petitioner's claim, we determine that Petitioner has failed to show that he is entitled to habeas corpus relief based on the description of the charges against him in the indictment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

Joseph Darryl Gaines, Pro Se, Clifton, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General, and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Petitioner was indicted by the Davidson County Grand Jury for four counts of rape of a child committed between September and December of 1999. Petitioner pled guilty to two counts of rape of a child on July 11, 2001. He received an effective eighteen-year sentence for the convictions.

On August 21, 2003, Petitioner sought relief via the writ of habeas corpus. The petition alleged that the convictions were void because the indictment was not signed by the district attorney general and the plea agreement was not signed by the judge. Additionally, Petitioner alleged that his sentences were illegal because they were outside the statutory sentencing range. The trial court summarily dismissed the petition for habeas corpus relief, and this Court affirmed the dismissal on appeal. *Joseph D. Gaines*, 2004 WL 2479918, at *1.

In May of 2005, Petitioner again sought habeas corpus relief, this time alleging that his judgments were void because the indictments did not list the specific dates of the offenses. Again, the trial court summarily dismissed the petition, and this Court affirmed the dismissal on appeal. *Joseph D. Gaines*, 2006 WL 287432, at *1.

On October 23, 2008, Petitioner filed a third petition for habeas corpus relief in which he alleged that the indictments were void because they did not allege the “specific type of sexual penetration the State intended to rely upon to establish the offense.” On January 5, 2009, the trial court granted a motion to dismiss that was filed by the State, dismissing Petitioner’s petition for writ of habeas corpus. On April 1, 2009, Petitioner filed a notice of appeal.

Analysis

At the outset, the State notes that the notice of appeal was untimely and urges this Court to dismiss the appeal because “[P]etitioner offers no explanation for his late-filed notice of appeal” and his “issues raised to [sic] not warrant waiver.”

A notice of appeal must be filed within thirty days after the date of entry of the judgment appealed from. Tenn. R. App. P. 4(a). The notice of appeal is not jurisdictional in criminal cases; the filing of the notice of appeal can be waived in the interest of justice. *Id.* Here, the trial court dismissed the petition for relief on January 5, 2009, and Petitioner did not file a notice of appeal until April 1, 2009. It is clear that the notice is untimely as it was not filed until more than three months after the trial court dismissed the petition. Petitioner filed a reply brief in which he asserts that he did not receive the copy of the order granting the motion to dismiss until March 9, 2009, and that the order was not even mailed by the trial court clerk until March 5, 2009. Thus, Petitioner argues that it would be impossible for him to timely file the notice. We choose to waive the timely filing of the notice of appeal in this case.

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner's filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280, 283 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

In the case herein, Petitioner contends that the indictment charging him with four counts of rape of a child failed to allege specific types of sexual penetration for each charge. The State argues that the indictments were clearly sufficient to inform Petitioner of the charges against him.

A valid indictment is essential to vest jurisdiction in the convicting court, and therefore an indictment that is so defective that it fails to invest jurisdiction may be challenged in a habeas corpus proceeding. *State v. Wyatt*, 24 S.W.3d 319, 320-23 (Tenn. 2000). In the case herein, the indictment about which Petitioner complains is attached to the habeas corpus petition and is in the record on appeal. The indictment names the appellant as the accused, the dates during which the offense occurred, the actus reus, mens rea, and references the statute defining the charged offense. The indictment was sufficient to inform Petitioner of the charges against him. *See State v. John Whatley*, No. M2003-01773-CCA-R3-CD, 2004 WL 2964710, at *3 (Tenn. Crim. App., at Nashville, May 9, 2005) (finding that indictment nearly identical to Petitioner's indictment was sufficient). The indictment is not required to allege the specific theory that the State will advance at trial. *Wyatt*, 24 S.W.3d at 324. The judgments against Petitioner are not void and his sentences have not expired. Therefore no grounds exist which would entitle Petitioner to habeas corpus relief. Thus, the trial court was correct in summarily dismissing habeas corpus petition.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE